

AGENDA

MONROE COUNTY BOARD OF COUNTY COMMISSIONERS

Any person who wishes to be heard shall provide the Clerk with his or her name and residence and the agenda item on which he or she wishes to be heard. Such information shall be on a card provided by the County. Once public input begins, there will be no further speaker cards allowed to be submitted to the Clerk for that subject. An individual has three minutes and a person representing an organization has five minutes to address the Board (except that individuals wishing to speak during public hearings pertaining to land use issues will have five minutes). The first person representing the organization will be allowed the five minutes. Subsequently, all other speakers on behalf of that organization have three minutes to address the Board. Once an individual has addressed the Board, he or she will not be permitted to return to the podium for follow-up comments, unless the issue involved is quasi judicial in nature. In that case, the applicant may return to the podium to conclude his or her position at the end of the public hearing.

ADA ASSISTANCE: If you are a person with a disability who needs special accommodations in order to participate in this proceeding, please contact the County Administrator's Office, by phoning (305) 292-4441, between the hours of 8:30 a.m. - 5:00 p.m., no later than five (5) calendar days prior to the scheduled meeting; if you are hearing or voice impaired, call "711".

Pleas note that all time approximate items are listed in bold.

Monday, April 11, 2016
Marathon Government Center
2798 Overseas Highway
MM 47.5 (Gulf)
Marathon , Florida

TIME APPROXIMATE

WORKSHOP

10:00 A.M. CALL TO ORDER SALUTE TO FLAG

- A. Approval Of Agenda.
- B. Discussion Of The County's Current Canal Restoration Program
And The Future Of The Program.

Documents: [B.PDF](#)

**BOARD OF COUNTY COMMISSIONERS
AGENDA ITEM SUMMARY**

Meeting Date: April 11, 2016

Department: Sustainability and Projects

Bulk Item: Yes No

Staff Contact Person: Rhonda Haag, 453-8774

AGENDA ITEM WORDING: Discussion of the County's current Canal Restoration Program and the future of the program.

ITEM BACKGROUND: The County's canal restoration program has been underway for 4 years. Grants from DEP and EPA funded the initial phases of the program, including the development of the Canal Management Master Plan, bathymetric surveys, and water quality monitoring. Additional grants from EPA and DEP funded construction projects including the Geiger Key culvert project and the Tropical Bay Estates culvert installation, in addition to canal outreach workshops, and research into alternative restoration technologies and the formation of a business plan. To keep the momentum moving, the County dedicated \$5 Million to construction a series of 7 demonstration projects to test five restoration techniques. All of the projects except the pumping project are underway or will be completed by June 2016. The pumping project, has not moved forward due to resident concern and lack of funding.

The BOCC approved \$2M for 2016 for additional demonstration projects, which were approved at the March 23, 2016 BOCC meeting. No additional funds have been identified for FY17 or beyond, and no long term plan is in place. The program is at a point where decisions need to be made about financing projects, project implementation, programmatic needs, operations and maintenance and staffing.

The agenda for the workshop is attached along with several attachments of documents that provide background information.

PREVIOUS RELEVANT BOCC ACTION:

- 3/21/12: Approval of a \$100,000 Grant from FDEP to fund Phase 1 of the Canal Management Master Plan (CMMP) and authorization for AMEC to develop the Plan.
- 06/20/12: Approval of a grant application to EPA requesting \$100,000 for Phase 2 of the CMMP.
- 09/12/12: Approval of a \$100,000 grant from EPA to fund Phase 2 of the CMMP.
- 11/20/12: Approval for AMEC to develop Phase 2 of the CMMP.
- 03/20/13: Approval of \$5 million in Canal Restoration Demonstration Projects.
- 03/20/13: Approval of a \$100,000 Grant from DEP (S0640) for bathymetric surveys and approval for AMEC to implement the work.
- 05/15/13: Approval of a contract with AMEC to select the demo projects, as a result of a Request For Quotes.
- 08/21/13: Approval of the selection process for the top 15 canals.
- 10/16/13: Approval of the top 15 canals, selection of 6 canals for the demonstration projects, and a 90 day limitation on the homeowner approval period.
- 12/11/13: Approval of the seventh demonstration projects for canal #288 in Big Pine Key for a weed gate.
- 05-21-14: Approval of contract with AMEC for design, permitting, field assessment tasks including bathymetric surveys, mangrove assessment, tidal studies for hydraulic modeling and geotechnical studies; project management and engineering support during construction for six (6) of the seven (7) demonstration canals in unincorporated Monroe County.

- 12/10/2014: Approval to enter into a contract with the lowest bidder responding to the advertisement for Request For Bids for the construction and installation of a culvert on Canal #472 on Geiger Key, the 3rd ranked canal project in the Canal Management Master Plan. Approval to fund \$121,350.59 towards the \$199,641.59 construction cost (the lowest bid). The remaining \$78,291.00 is being funded by DEP Grant S0273.
- 12/10/14: Adopted an ordinance creating Section 6-3 for temporary construction staging areas
- 01/21/2015: Approval to enter into an Agreement with Adventure Environmental, Inc. for \$1,360,000.00 for construction of the canal backfilling water quality improvement demonstration project at Canal #29, Sexton Cove, Key Largo.
- 04-15-15: Approval to enter into a contract with JND Thomas Company for \$1,839,905 plus Alternative B for \$159,906 for removal of organic muck material from Canal #266 located between Baileys and Witters Lanes in Doctor's Arm and Canal #290 located between Avenues I and J on Big Pine Key utilizing vacuum dredging.
- 04/15/15: Approval to advertise a public hearing to section 6-3 of the MCC relating to the allowance of temporary setback variances for temporary construction staging areas with a special permit granted by the BOCC.
- 01/20/2016: Approval to enter into a contract with Douglas N. Higgins, Inc. for 423,957.00 for installation of a 60-inch circular concrete reinforced pipe culvert at Canal #277 in order to increase the natural tidal flushing.
- 02/10/2016: Approval to enter into a contract with Earth Tech Enterprises, Inc. for \$202,384 to remove an existing ineffective weed barrier system and install a new air curtain system on Canal #266 (located between Baileys Lane and Witters Lane in Doctor's Arm Big Pine Key); to demolish portions of an existing ineffective weed barrier and install a new air curtain system at on Canal #287 (located between Atlantis Drive and Hollerich Drive in Big Pine Key).

CONTRACT/AGREEMENT CHANGES: Not applicable

STAFF RECOMMENDATIONS: Not applicable

TOTAL COST \$N/A. **INDIRECT COST:** ___ **BUDGETED:** Yes ___ No ___ N/A ___

DIFFERENTIAL OF LOCAL PREFERENCE: N/A

COST TO COUNTY:

SOURCE OF FUNDS: For discussion

REVENUE PRODUCING: Yes ___ No X **AMOUNT PER MONTH** ___ **Year** ___

APPROVED BY: County Atty  OMB/Purchasing ___ Risk Management ___

DOCUMENTATION: Included X Not Required ___

DISPOSITION: _____ **AGENDA ITEM #** _____

MONROE COUNTY BOCC CANAL RESTORATION WORKSHOP AGENDA
APRIL 11, 2016
10:00 AM – 3:00 PM
MARATHON GOVERNMENT CENTER 2798 OVERSEAS HIGHWAY
MONROE COUNTY BOCC ROOM 2ND FLOOR, MARATHON, FL 33050

1. The Need for a Canal Restoration Program

- a. Welcome and introduction to purpose of workshop - Rhonda Haag
- b. Municipalities:
 - o Islamorada, Village of Islands – Mike Forster
 - o City of Marathon – George Garrett
 - o City of Key Colony Beach – Jerry Ellis
 - o City of Layton – Skip Haring
 - o City of Key West – Alison Higgins

2. Public Comment

3. Results from the \$5 Million Demo Program

- a. Summary of the Canal Management Master Plan - Wendy Blondin
 - i. Water quality assessment, prioritization for restoration, identified various restoration options
 - ii. Did not develop conceptual designs, costs, or schedule for implementation
 - iii. Did provide enough information to start evaluating restorations
- b. Demonstration Project Construction Updates - Wendy Blondin
- c. Water Quality Improvements -before and after – are they working? - Wendy Blondin
- d. Budget Expenditures - Wendy Blondin

4. Regulatory Requirements Related to Canal Water Quality Impairments – Are We Mandated?

- a. Monroe County Attorney’s Memorandum on Canal Restoration Regulatory Background State’s Clean Water Act, TMDL - What would trigger a TMDL and Consequences of No Action - Derek Howard
- b. Florida Keys National Marine Sanctuary and Protection Act – law mandated development of a Water Quality Protection Program which is administered by DEP and EPA - canal restoration is identified as a top priority and next challenge in the Water Quality Improvement Plan - Sean Morton FKNMS
- c. Overview of Reasonable Assurance Documents – EPA Letter dated August 28, 2015 - Steve Blackburn EPA
- d. DEP Impaired canals and requirements – DEP Letter dated September 10, 2015 - Jon Iglehart/Gus Rios DEP
- e. TMDL program requirements – practical aspects of TMDL versus Reasonable Assurance Document - Walt Reigner

LUNCH

5. Long-Term Financing Strategies for Canal Restorations

- a. Summary of known funding sources – grants, legislative, Restore Act, Stewardship Bill, Infrastructure taxes – Lisa Tennyson
 - i. Test of use of infrastructure tax dollars for canal restorations - Bob Shillinger
- b. Issues to be addressed
 - i. Ownership of canal waters and canal bottoms – Peter Morris
 - ii. Can canals be public facilities? – Peter Morris
 - iii. Liability apportionment for canal conditions – Derek Howard
 - iv. Does the County have the Right of Use of canals to close them to boat traffic (with no ownership issues) – Peter Morris

- v. Resident notification and approval process for doing work in a canal when ownership is not documented - Peter Morris
 - Current: minimum 75% signed returned homeowner letter approval required.
 - New Recommendation: Outgoing Notification letter and community meeting only. Plus permit process notification.
- vi. Resident notification and approval process for doing work in a canal when ownership is private – Peter Morris
- vii. Sea Level Rise Impact on selection of canals for restoration – policy decision is needed – Rhonda Haag
- c. Overview of general revenue tools, such as assessments, taxing, MSBU, MSTU and Fee for Service using Equivalent Residential Units (ERUs) - Cynthia Hall and Elizabeth Treadway
- d. Actual Funding Strategies Used throughout Florida – Elizabeth Treadway
- e. Considerations for Long-term Financing - Elizabeth Treadway
 - i. Equity of Apportionment (all land owners, only water front property owners, undeveloped lots, County owned lots, Federal or State owned lots, Tiered fee approach). Have residents define their jurisdiction if it is an MSTU.
 - ii. How much can the County manage/spend per year (level and extent of service)
- f. Integrated Approach – multiple sources of funding – Elizabeth Treadway
 - i. Private/Public Partnership - Homeowner funding participation - voluntary or required? What % do the residents pay? Matching funds moves the canal up in prioritization for selection for restoration.
 - ii. Operation and maintenance after 2 years – MOU needed, County oversight?
 - iii. Long term

6. Need for a Long Term Implementation and Funding Plan

- a. Develop a strategic implementation plan and funding scheme – Rhonda Haag
 - i. Cost of full restoration
 - a. Quantify muck thicknesses and disposal options
 - b. Update water quality monitoring data
 - ii. Limit and extent of services
 - iii. Annual expenditures
 - iv. Management of program – structure and day-to-day implementation
 - v. Schedule
 - vi. How to Measure Success

7. Benefits to Residents – Rhonda Haag

8. Future BOCC Actions – Rhonda Haag

Staff Direction Needed:

- For moving forward with a canal restoration program
- For approval for funding development of an Implementation Plan
- To solicit for a Continuing Services Engineering Contract for canal restoration services
- To select and move forward with implementation of a funding strategy at one canal as a demonstration project
- For change in the homeowner approval process
- On homeowner participation levels
- On evaluating alternative technologies for Eden Pines
- To research the influences of sea level rise on canal restorations

9. Public Comment

ATTACHMENT FOR BOCC CANAL RESTORATION WORKSHOP

Memorandum from Derek Howard, Assistant County Attorney

Re: Canal Restoration and Regulation

County of Monroe

The Florida Keys



BOARD OF COUNTY COMMISSIONERS

Mayor Danny L. Kolhage, District 1
Mayor Pro Tem Heather Carruthers, District 3
George Neugent, District 2
David Rice, District 4
Sylvia J. Murphy, District 5

Robert B. Shillinger, County Attorney**

Pedro J. Mercado, Assistant County Attorney **
Natileene W. Cassel, Assistant County Attorney**
Cynthia L. Hall, Assistant County Attorney **
Christine Limbert-Barrows, Assistant County Attorney **
Derek V. Howard, Assistant County Attorney**
Lisa Granger, Assistant County Attorney
Steven T. Williams, Assistant County Attorney**
Peter H. Morris, Assistant County Attorney
Chris Ambrosio, Assistant County Attorney

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** Board Certified in City, County & Local Govt. Law

MEMORANDUM

TO: Bob Shillinger
Monroe County Attorney

FROM: Derek Howard
Assistant County Attorney

Date: September 8, 2015

RE: Canal Restoration and Regulation

I. Introduction

This memorandum briefly examines the regulations and agreements that apply to canal water quality in Monroe County, and the County's obligations thereunder to proceed with canal restoration projects. It is generally agreed that dead-end or poorly-flushed canals contribute to poor nearshore water quality in the Keys.¹

¹ "Dead-end or poorly-flushed canals also contribute to poor nearshore water quality in the Keys. Stormwater runoff and wastewater from septic tanks enters canals and may be carried by tidal currents into nearshore marine waters." National Keys Marine Sanctuary, *Water Quality: Frequently Asked Questions*, available online at <http://floridakeys.noaa.gov/scisummaries/wqfaq.pdf>. See also AMEC Environmental & Infrastructure, Inc., *Canal Management Master Plan*, pg. iii, Sept. 20, 2013 ("Canals within the Florida Keys have recently received considerable attention from regulatory agencies because many are associated with poor water quality. Canals with poor water quality have the potential to cause significant harm to near shore marine waters upon which the community depends. Water quality impairments within canals are most often associated with low dissolved oxygen (DO) as a result of accumulated organic matter or lack of flushing.")

II. Federal and State Regulation under the Clean Water Act (CWA)

The Clean Water Act (CWA) establishes the basic structure for regulating discharges of pollutants into the waters of the United States, as well as water quality standards for surface waters.² The basis of the CWA was enacted in 1948 as the Federal Water Pollution Control Act, which was significantly amended in 1972. The objective of the CWA is to “to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.”³ Section 301(a) of the CWA makes unlawful the discharge of any pollutant into navigable waters except as authorized by specified sections of the Act.⁴ Under the CWA, the EPA has established wastewater standards for industry, as well as water quality standards for all contaminants in surface waters.

“Under the CWA, the federal and state governments share duties to monitor and regulate water pollution, with the states bearing primary responsibility for implementing pollution control mechanisms and the federal government overseeing the states' actions in that regard. As a threshold matter, states are required to establish water quality standards to define the level of water quality for each waterbody within their borders.”⁵ There are three components to water quality standards: (1) the designated uses of the waterbody;⁶ (2) the water quality criteria necessary to support the designated uses, expressed as constituent concentrations, levels, or narrative statements;⁷ and (3) an anti-degradation policy that is consistent with the EPA's anti-degradation regulation and specifies the circumstances under which the state may authorize the lowering of water quality criteria.⁸ “Once water quality standards have been established, states must monitor waterbodies to determine whether the standards are being met and develop mechanisms to either maintain or restore water quality, depending on the circumstances.”⁹

² 33 U.S.C. § 1251 *et seq.* (1972)

³ 33 U.S.C. § 1251(a)

⁴ 33 U.S.C. § 1311(a)

⁵ *Florida Clean Water Network, Inc. v. E.P.A.*, 2012 WL 1072216 (N.D. Fla. March 30, 2012)

⁶ *see* 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. §§ 131.3(f), 131.10

⁷ *see* 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. §§ 131.3(b) and (i), 131.11

⁸ *see* 40 C.F.R. § 131.12(a) (2); *Am. Wildlands v. Browner*, 260 F.3d 1192, 1194 (10th Cir.2001). Florida's anti-degradation policy is found in 62-302.300 and 62-4.242, F.A.C.

⁹ *Florida Clean Water Network, Inc. v. E.P.A.*, 2012 WL 1072216 (N.D. Fla. March 30, 2012)

The Florida legislature authorized the Florida Department of Environmental Protection (FDEP) to promulgate water quality standards for the state.¹⁰ On May 29, 1990, the FDEP exercised that authority and promulgated chapter 62–302 of the Florida Administrative Code, which sets forth the water quality standards for all of the state's surface waters.¹¹ All waters of the state fall into one of five surface water classifications with specific criteria applicable to each class of water.¹² The numbers run from most protected (class I) to least protected (class V). The nearshore waters in the Florida Keys, including canals, are classified as Class III (Recreation, Propagation and Maintenance of a Healthy, Well-Balanced Population of Fish and Wildlife).¹³ For these waters, the applicable water quality standard is Chapter 62-302.530(30), F.A.C., which states that dissolved oxygen (“DO”) in Class III marine waters: “Shall not average less than 5.0 milligrams/liter in a 24-hour period and shall never be less than 4.0 milligrams/liter. Normal daily and seasonal fluctuations above these levels shall be maintained.”¹⁴ In addition to its surface water classification, a water body may be designated as an Outstanding Florida Water.¹⁵ In 1985, Florida designated the waters surrounding the Florida Keys “Outstanding Florida Waters” (OFW). Designation of OFW is intended to protect existing good water quality by eliminating the discharge of any pollutant that would result in a degradation of existing conditions.¹⁶

The CWA requires that states identify and compile a list of the waters within their boundaries that do not meet the applicable water quality standards and thus are not safe for their designated purposes.¹⁷ The list is known as the “Impaired Waters List” or “section 303(d) list.”¹⁸ “For each

¹⁰ See Fla. Stat. § 403.061(11)

¹¹ See Fla. Admin. Code r. 62–302.200–.800.

¹² (62-302.400 F.A.C.)

¹³ The surface waters of the state are Class III unless described in rule 62-302.400, F.A.C.

¹⁴ The threshold limits on pollutants in surface waters--Florida's surface water quality standards on which TMDLs are based--are set forth primarily in rule 62-302, Florida Administrative Code, and the associated table of water quality criteria.

¹⁵ (62-302.700 F.A.C.)

¹⁶ Section 403.061(27), Florida Statutes, grants the Department of Environmental Protection (DEP) the power to establish rules that provide for a special category of waterbodies within the state, to be referred to as “Outstanding Florida Waters,” which shall be worthy of special protection because of their natural attributes.

¹⁷ See 33 U.S.C. § 1313(d)(1)(A); 40 C.F.R. § 130.7(b), (d)(1).

waterbody included on the section 303(d) list, the state must calculate a Total Maximum Daily Load (TMDL) for every pollutant causing the waterbody not to meet the applicable standards; as the phrase suggests, the TMDL establishes the maximum quantity of the pollutant that can be received on a daily basis without exceeding the standard.”¹⁹ As an alternative, a Reasonable Assurance Document (RAD) may be developed in lieu of a TMDL when local management activities are already in place or planned that can achieve water quality targets.²⁰

In 2002, the nearshore waters and canals of the Florida Keys were determined by the State of Florida to be impaired due to nutrients, and in violation of Florida Administrative Code § 62-302.530(47)(b) which states that “in no case shall nutrient concentrations of body of water be altered so as to cause an imbalance in natural populations of flora or fauna.”²¹ As required by Section 303(d) of the CWA, the waterbody was added to the state’s list of impaired surface waters. This triggered the State’s obligation to develop a TMDL or develop a RAD.

2008 FKRAD

In 2008, the responsible governmental agencies and stakeholders in Monroe County chose the alternative RAD route of complying with the CWA and developed the Florida Keys Reasonable Assurance Document (FKRAD) to address nutrient issues in many of the waters within the Florida Keys.²² FKRAD set forth and accelerated the actions that have been taken or were planned to be taken to reduce nutrient loadings to near shore waters throughout the Florida Keys so that water quality standards are met and beneficial uses are restored.

¹⁸ *Florida Clean Water Network, Inc. v. E.P.A.*, 2012 WL 1072216 (N.D. Fl March 30, 2012). States are required to submit their section 303(d) list and TMDLs to the EPA for review and approval every two years. See 33 U.S.C. § 1313(d)(2); 40 C.F.R. § 130.7(d)(1).

¹⁹ *Florida Clean Water Network, Inc. v. E.P.A.*, 2012 WL 1072216 (N.D. Fl March 30, 2012). See also 33 U.S.C. § 1313(d)(1)(C); 40 C.F.R. § 130.7(c).

²⁰ See, F.A.C. 62-303.600(b). See also, FKNMS, *2011 Annual Report*, available online at <http://floridakeys.noaa.gov/about/111202fknms-ar.pdf>. See also FDEP, Division of Environmental Assessment and Restoration, *Guidance on Developing Restoration Plan as Alternative to TMDLs—Assessment Category 4b and 4e Plans* (June 2015), available online at <http://www.dep.state.fl.us/water/watersheds/assessment/docs/4b4ePlansGuidance.pdf>

²¹ U.S. EPA, Florida Keys National Marine Sanctuary Water Quality Protection Program, Report to Congress (September 2013)

²² FKRAD was comprised of a series of plans, including: “Northern Keys Area Reasonable Assurance Documentation”, “Central Keys Area Reasonable Assurance Documentation”, “South Central Keys Area Reasonable Assurance Documentation”, and “Southern Keys Area Reasonable Assurance Documentation”

In 2009, “FDEP provided a draft of the FKRAD to USEPA for preliminary review, and received a general positive response, but USEPA voiced concerns regarding dissolved oxygen levels in canals. USEPA indicated that factors such as canal hydrology and accumulation of dead seaweed may continue to impair water quality in some areas.”²³

2011 FKRAD Update

In 2011, FKRAD was updated to document actions taken by stakeholders since 2008 to return the area’s near shore water quality to the targets set for total nitrogen (TN) and total phosphorous (TP).²⁴ This document also addresses the dissolved oxygen (DO) impairment identified by the Florida Department of Environmental Protection (Department) in some of the water segments for the Florida Keys.

FDEP recognized in the 2011 FKRAD that water quality in canals would not achieve Class III marine DO standards after the management activities were completed. For this reason, the department stated it would continue to work with the stakeholders and study potential canal improvements, beyond the management activities listed in the 2011 RAD, and evaluate whether reclassification to Class III-Limited was appropriate.²⁵ Class III-Limited is restricted to waters with human-induced physical or habitat conditions that, because of those conditions, have limited aquatic life support and habitat that prevent attainment of Class III uses. Class III-Limited is designated for the following uses: fish consumption; recreation or limited recreation and/or propagation and maintenance of a limited population of fish and wildlife.²⁶ Class III-Limited surface waters share the same water quality criteria as Class III except for any site-specific alternative criteria that have been established for the water body under Rule 62-302.800, Florida Administrative Code.

²³ FKNMS, *2011 Annual Report*, available online at <http://floridakeys.noaa.gov/about/111202fknms-ar.pdf>

²⁴ FDEP, *Florida Keys Reasonable Assurance Documentation Update* (December 2011)

²⁵ *Id.* at 14

²⁶ Fla. Admin. Code R. 62-400(1) (2015)

III. Florida Keys National Marine Sanctuary (FKNMS)

The waters of the Florida Keys are afforded additional protection by virtue of being included in the Florida Keys National Marine Sanctuary (FKNMS). FKNMS was designated pursuant to the Florida Keys National Marine Sanctuary and Protection Act²⁷ on November 16, 1990, and is one of 14 marine protected areas that make up the National Marine Sanctuary System.²⁸ FKNMS protects 2,900 square nautical miles of waters surrounding the Florida Keys, from south of Miami westward to encompass the Dry Tortugas, excluding Dry Tortugas National Park.²⁹

The sanctuary was created and exists under federal law. “However, because approximately 60 percent of the protected area falls in state waters, the sanctuary is also effective in these state waters under consent of the State of Florida. This creates a unique partnership whereby the sanctuary is administered by NOAA and jointly managed by NOAA and the State of Florida under a co-trustee agreement.”³⁰ “Under this agreement, NOAA’s primary management partner is the Florida Department of Environmental Protection (DEP). The Florida Fish and Wildlife Conservation Commission (FWC) enforces sanctuary regulations in partnership with sanctuary managers and the NOAA Office of Law Enforcement. The sanctuary also works with multiple state and federal agencies, universities, and non-governmental organizations to protect the complex coral reef community in the Keys. The relationship with some of these groups, such as the U.S. Environmental Protection Agency, is based on the legislation that created the sanctuary. Other relationships have evolved through cooperative agreements or arrangements based on shared geographic boundaries, missions, goals, or interests.”³¹

Water Quality Protection Program (WQPP)

In 1992, Congress directed USEPA and that State of Florida to develop a Water Quality Protection Program (WQPP) for the Florida Keys National Marine Sanctuary. The purpose of the

²⁷ Public Law 101-605 (H.R. 5909)

²⁸ FKNMS, *About Florida Keys National Marine Sanctuary*, available online at <http://floridakeys.noaa.gov/about/welcome.html?s=about>

²⁹ *Id.*

³⁰ FKNMS, *Florida Keys National Marine Sanctuary Administration and Legislation*, available online at <http://floridakeys.noaa.gov/legislation.html>

³¹ *Id.*

WQPP is to recommend corrective action to protect water quality and compliance schedules to address point and nonpoint sources of pollutions to restore and maintain the chemical, physical and biological integrity of the Sanctuary. “Canal water quality restoration is a priority of the WQPP Steering Committee which recently passed a motion to develop a plan to prioritize canal restoration projects and to identify funding sources for these projects.”³²

A Canal Restoration Advisory Subcommittee was created to address water quality in the Keys canals. The members include EPA, NOAA, DEP, FWC, Monroe County and the incorporated municipalities in the Florida Keys. According to the EPA:

Many of the canals in the Keys are not achieving the Class III designation – safe for swimming and fishing. The canals are deep, narrow, linear, many with dead-end configurations and are impaired due to low oxygen concentrations, high fecal coliform bacteria counts, and high concentrations of nutrients. In 2002, Monroe County funded the preparation of “*Monroe County Residential Canals: Inventory and Assessment.*” That report provided an inventory of the canals, a GIS database, a water quality classification methodology, and recommended remedial actions (weed gates, air curtains, backfilling and shallowing of canals, flushing, culverts, circulation devices, and nutrient removal) to improve water quality in the future.

The completion of the Little Venice Demonstration Project demonstrates that water quality within the canals will gradually show improvement as Monroe County implements improvements in wastewater and stormwater treatment. However, those improvements alone will not return many canals to Class III compliance.³³

A Canal Management Master Plan (CMMP) was prepared in 2013 and identified the following issues and goals: (a) nutrients and dissolved oxygen; (b) organic materials (e.g. weed wrack); (c) sediment quality; (d) habitat quality; and (e) public involvement.³⁴ The plan involved a two-step process. The first step involved engineering and science based assessment and evaluation including the following: comprehensive mapping of residential canals; field study of water quality in residential canals; developing a ranking system for categorizing canals based on observed

³² *Monroe County Canal Management Master Plan (CMMP) and Canal Restoration Public Outreach Seminar*, pg. 12, available online at <http://fl-monroecounty.civicplus.com/DocumentCenter/View/8915>

³³ U.S. EPA, Florida Keys National Marine Sanctuary Water Quality Protection Program, Report to Congress (September 2013)

³⁴ AMEC Environmental & Infrastructure, Inc., *Canal Management Master Plan*, Sept. 20, 2013

characteristics; and prioritizing canals based on need for water quality improvement. The second step is outreach, management and program development. This step includes prescribing a list of best management practices that can be implemented by homeowners; and identifying funding sources for implementing canal quality restoration.³⁵

IV. CWA Enforcement

Under the FKRAD, Monroe County has made commitments to implement corrective actions to reduce pollution and restore canal water quality. If Monroe County were to abandon its commitments, then the EPA could utilize a number of enforcement tools against the County. CWA enforcement mechanisms include injunctions, civil administrative and judicial actions, and criminal prosecutions brought against both institutions and individuals. Enforcement actions may be brought by the EPA, the U.S. Army Corps of Engineers (Corps), states enforcing Section 402 as part of their delegated authority to administer the NPDES program within their borders, and private citizens.

Section 309(a) authorizes EPA to issue broad administrative orders mandating compliance with the CWA, including orders to command persons to cease their unpermitted discharges. Section 309(g) allows for administrative penalties.³⁶ Sections 309(b) and (d) authorize EPA to bring federal judicial enforcement actions seeking injunctive relief and civil penalties.³⁷ Civil liability under the CWA is not limited to intentional violations; the statute provides for strict liability.³⁸ Under Section 309(c) of the CWA, EPA can also seek criminal sanctions.³⁹

Citizen Suits Under the CWA

The CWA includes a “citizen suit” provision that gives persons affected by violations of the Act a private right of action “to enforce” the Act against violators, including the United States, a

³⁵ *Monroe County Canal Management Master Plan (CMMP) and Canal Restoration Public Outreach Seminar*, pg. 12, available online at <http://fl-monroecounty.civicplus.com/DocumentCenter/View/8915>

³⁶ CWA § 309(g)(3), 33 U.S.C. § 1319(g)(3).

³⁷ *Id.* §§ 309 (b), (d), 33 U.S.C. §§ 1319(b) (injunctive relief provision) and (d) (civil penalties).

³⁸ *U.S. v. Bd. of Trustees of Fla. Keys Cmty. Coll.*, 531 F. Supp. 267 (S.D. Fla. 1981).

³⁹ CWA § 309(c), 33 U.S.C. § 1319(c).

government instrumentality or agency, or administrator.⁴⁰ While the federal and state governments have primary enforcement authority, Congress intended citizen suits to be an essential component of the Act's enforcement scheme.⁴¹

Congress included certain “gatekeeper” provisions in the CWA to minimize conflicts between citizen enforcement and agency enforcement. Before a citizen may file suit, the Act requires that the citizen give sixty days' notice of the alleged violation to the violator, EPA, and the state.⁴² If EPA or the state wishes to preclude a citizen suit, it may file and “diligently” prosecute its own judicial enforcement action after receiving the citizen's notice of suit.⁴³ The citizen suit may be filed after the expiration of the notice period if the EPA or the state does not take action, and if the violator does not take all corrective action necessary to ensure sustained compliance with the CWA.⁴⁴ Citizen suits may seek injunctive relief to enforce a standard or limitation and civil penalties payable to the federal government.⁴⁵

Could the Canals Be Considered Point Sources?

The FKRAD and current regulation of canals in Monroe County do not contemplate the canals themselves as “point sources” that require an NPDES permit. One additional source of liability for Monroe County, as well as the homeowners associations that exercise control over canals, is if the canals were deemed to be “point sources” that discharge pollutants (i.e. excessive nutrients) into the connecting waters. “To establish a CWA violation, the plaintiff[] must prove that (1) there has

⁴⁰ 33 U.S.C. § 1365(a).

⁴¹ See 33 U.S.C. § 1251(e) (“Public participation in the development, revision, and *enforcement* of any regulation, standard [or] effluent limitation ... shall be provided for, encouraged, and assisted by the Administrator [of EPA] and the States.”) (emphasis added).

⁴² See 33 U.S.C. § 1365(b)(1)(A). See also *Nat'l Env'tl. Found. v. ABC Rail Corp.*, 926 F.2d 1096, 1097 (11th Cir.1991) (“[T]he 60-day notice requirement of 33 U.S.C. § 1365(b) is a mandatory condition precedent to the filing of a citizen suit under the Clean Water Act.”). Pre-suit notice must contain sufficient information to permit the recipient to identify the specific standard, limitation, or order alleged to have been violated, the activity alleged to constitute a violation, the person or persons responsible for the alleged violation, the location of the alleged violation, the date or dates of such violation, and the full name, address, and telephone number of the person giving notice. 40 C.F.R. 135.3(a). “The notice requirements are strictly construed to give the alleged violator the opportunity to correct the problem before a lawsuit is filed.” *Nat'l Parks and Conservation Ass'n v. Tenn. Valley Auth.*, 502 F.3d 1316, 1329 (11th Cir.2007).

⁴³ See *id.* § 1365(b)(1)(B).

⁴⁴ see *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987) (citizens may not bring suit if violations are not “ongoing” at the time of the filing of the complaint).

⁴⁵ CWA § 404(a)(2), 33 U.S.C. § 1365(a)(2).

been a discharge; (2) of a pollutant; (3) into waters of the United States; (4) from a point source; (5) without a NPDES permit.”⁴⁶ A “point source” is defined as

any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.⁴⁷

Additional research is being conducted to determine whether the theory of a canal as a “point source” could be meritorious in a possible citizen suit.

V. Conclusion

The canals of the Florida Keys are regulated as impaired waters, as well as a contributor to the degradation of the connecting nearshore waters. The waters of the Florida Keys were found to be in violation of the CWA. Monroe County’s partnership and continued work with other stakeholders under the FKRAD to improve canal water quality has averted the development of TMDLs and adversarial actions. However, as the entity with primary jurisdiction over development approval and land uses, Monroe County could be held liable as a party in public and private enforcement actions if it refused to honor its commitments under the FKRAD and restore impaired canals.

⁴⁶ *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1008 (11th Cir.2004).

⁴⁷ § 1362(14).

ATTACHMENT FOR BOCC CANAL RESTORATION WORKSHOP

**U.S. Environmental Protection Agency and Florida Department of Environmental
Protection Letters**

Re: Clarifying Canal Impairments and Monroe County Responsibilities



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4
ATLANTA FEDERAL CENTER
61 FORSYTH STREET
ATLANTA, GEORGIA 30303-8960

AUG 28 2015

Mr. George R Neugent
1583 Eastward Ho Lane
Marathon, Florida 33050

Dear Mr. Neugent:

Thank you for your July 28, 2015, inquiry to the U.S. Environmental Protection Agency on behalf of Monroe County seeking clarification of Monroe County's state and federal responsibility to restore the impaired canal systems as described in the Florida Keys Reasonable Assurance Document (FKRAD). Water quality monitoring of the nearshore waters (halo zone) and the inland canal systems of the Keys, confirmed pollution due to excessive nutrients and low dissolved oxygen. The failure to meet water quality standards put the Florida Keys on the Clean Water Act Section 303(d) list of impaired waters. Once on the 303(d) list, the State or the EPA is required to develop Total Maximum Daily Loads (TMDLs) to restore the waterbodies. In lieu of developing the TMDLs, Monroe County and local stakeholders contacted the EPA and State and expressed interest in pursuing a FKRAD, a commitment by a local sponsor and stakeholders to implement corrective actions to reduce pollution and restore waters. Monroe County was already in a strong leadership position through their participation in the Florida Keys National Marine Sanctuary Water Quality Protection Program that was established to address pollution from wastewater, stormwater, marinas, and other sources. After a series of technical and stakeholder meetings, the decision was made by Monroe County and local stakeholders to develop a FKRAD that was finalized in 2008 and approved by the Florida Department of Environmental Protection (FDEP) in 2012.

At the time of the FKRAD development, it was known that wastewater and stormwater management alone would not restore canal systems due to canal depths, organic loadings, canal configuration and hydrological restrictions. The EPA, FDEP and stakeholders also recognized the limitations of the FKRAD to accurately identify sources of impairment, loading rates, water quality targets, outside sources, effective corrective measures, and funding for pollution control measures. To manage these unknowns, the FKRAD included the adaptive management process. Adaptive management is the commitment to revise the FKRAD and pollution controls, if progress towards achieving water quality standards is not demonstrated. Monroe County and the stakeholders have accepted the challenges of adaptive management and shown their commitment to the environment of the Florida Keys. This is best demonstrated by the elimination of approximately 25,000 polluting septic tanks and cesspits and the implementation of state-of-the-art wastewater facilities throughout the Keys by 2016 at a cost approaching \$1 billion.

In 2013, Monroe County provided \$5 million to implement the Monroe County Canal Management Master Plan (CMMP) and pilot restoration technologies at seven canals. As a partner, the EPA has provided \$5 million towards Keys water quality and seagrass monitoring to assess FKRAD implementation; \$300,000 towards pre- and post-water quality and seagrass monitoring of the canal demonstration sites; and \$300,000 to develop the CMMP, explore alternative technologies for remediating canals, and support public outreach efforts by Monroe County. It is important that Monroe

County and its partners continue to implement the CMMP to protect water quality, aquatic life, and seagrasses for residents living along these canals.

The FKRAD was adopted as a FDEP order on February 7, 2012, and subsequently accepted by the EPA. The FKRAD states that the management actions will be completed by 2015 and water quality improvement in the halo zone and inland canals is expected by 2020. If it is determined by the FDEP or the EPA that implementation of the FKRAD is not achieving the expected water quality improvements for nutrients and dissolved oxygen, the impaired waterbodies will be reassessed and given a higher priority for TMDL development. Again, thank you for your inquiry. If you have questions or need additional information from the EPA, please contact Mr. Steven Blackburn of my staff at (404) 562-9397.

Sincerely

A handwritten signature in black ink, appearing to read 'J. Giattina', written over a horizontal line.

James D. Giattina
Director
Water Protection Division



**FLORIDA DEPARTMENT OF
ENVIRONMENTAL PROTECTION**

BOB MARTINEZ CENTER
2600 BLAIRSTONE ROAD
TALLAHASSEE, FLORIDA 32399-2400

RICK SCOTT
GOVERNOR

CARLOS LOPEZ-CANTERA
LT. GOVERNOR

JONATHAN STEVERSON
SECRETARY

September 10, 2015

Mr. George Neugent
1583 Eastward Ho Lane
Marathon, FL 33050

SUBJECT: FL Keys Restoration

Mr. Neugent,

This letter is intended to provide clarification on Monroe County's responsibilities to restore water quality in the waters surrounding the FL Keys, including inland canals, under the Secretarial adopted FL Keys Reasonable Assurance Document (FKRAD). The FKRAD was developed to address nutrient impairments in the nearshore waters. The plan was completed and implementation of the plan began in 2008. In 2011, the waters were re-assessed by DEP and some of the inland canals were found to have low dissolved oxygen (DO) which did not meet the water quality standard. This meant the canals were "impaired" and would be added to the State's list of waters that need a Total Maximum Daily Load (TMDL) determination. The original FKRAD did not include projects to specifically address DO impairments in the canals, but the department decided to delay adding them to the "impaired" waters list because the work being done under the existing plan would address the anthropogenic nutrient inputs contributing to low DO in the canals. This meant a TMDL was not necessary at that time due to on-going restoration activities. The canal restoration work that has been initiated addresses the other factors (mainly hydrologic) contributing to low DO that are not covered under the FKRAD. These efforts in conjunction with the nutrient reductions in the FKRAD provide the flexibility to postpone TMDL development; however, if water quality standards for nutrients and dissolved oxygen are not achieved under the FKRAD or through other restoration efforts, the waters will be placed on the list for TMDL development. It is the department's hope that FKRAD stakeholders will continue to meet their commitments detailed in the document and the additional restoration efforts such that water quality standards will be achieved as expected by 2020.

Sincerely,

A handwritten signature in purple ink, appearing to read "Julie [unclear]", is written over a faint, illegible typed name.

Julie Espy
Water Quality Assessment, Program Administrator
Division of Environmental Assessment and Restoration

ATTACHMENT FOR BOCC CANAL RESTORATION WORKSHOP

**Florida Department of Environmental Protection Web Information -
Frequently Asked Questions about Total Maximum Daily Loads**

Frequently Asked Questions about Total Maximum Daily Loads

Source: Florida Department of Environmental Protection web page:

<http://www.dep.state.fl.us/water/tmdl/>; <http://www.dep.state.fl.us/water/tmdl/faq.htm>;
<http://www.dep.state.fl.us/water/watersheds/bmap.htm>

What is a Total Maximum Daily Load (TMDL)?

Total Maximum Daily Loads are quantitative analyses of water bodies where one or more water quality standards are not being met, and are aimed at identifying the management strategies necessary to attain those water quality standards. In essence, TMDLs describe the amount of each pollutant a water body can receive without violating standards, and are characterized as the sum of wasteload allocations, load allocations, and a margin of safety to account for uncertainties. Wasteload allocations are pollutant loads attributable to existing and future point sources, such as discharges from industry and sewage facilities. Load allocations are pollutant loads attributable to existing and future nonpoint sources and natural background. Nonpoint sources include runoff from farms, forests, urban areas, and natural sources, such as decaying organic matter and nutrients in soil.

TMDLs take into account the water quality of an entire water body or watershed and assess all the pollutant loadings into that watershed, rather than simply considering whether each individual discharge meets its permit requirements. The management strategies that emerge from the TMDL process may encompass everything from traditional regulatory measures, agricultural best management practices and other pollution prevention measures, land acquisition, infrastructure funding, pollutant trading, and the like. They also will include an overall monitoring plan to test their effectiveness.

Why are TMDLs developed?

For the past twenty-five years, point source discharges have been regulated under the Clean Water Act ([CWA](#)). Over time, it has become clear in many instances that every individual discharge into a water body may meet effluent discharge requirements and yet that water body may still fail to meet the standards defining good water quality. This circumstance has proved true even as the limits on point source discharges have become more and more stringent, especially in Florida. There clearly are other sources of pollution for which existing control measures are simply not adequate. These sources are associated with diffuse runoff and habitat destruction, and originate in both urban and rural areas.

The EPA requires states to set priorities for cleaning up impaired waters by establishing a TMDL for each one. Under the authority of section 303(d) of the CWA, EPA requires that TMDLs be developed where technology-based effluent limitations or other legally required pollution control mechanisms are not stringent enough to protect water quality. Florida has hundreds of impaired water bodies or water body segments that likely will have to be addressed through the development and implementation of TMDLs.

The development of Total Maximum Daily Loads (TMDLs) will take place in the context of [chapter 99-223, Laws of Florida](#), which details the process for listing impaired waters, determining which waters will be subjected to TMDL calculations, adopting by rule those calculations and associated allocations of pollutant loadings, and implementing the management strategies designed to reduce the loadings and enable the water body to meet water quality standards.

How are TMDLs Established?

As noted, TMDLs are established for waters that fail to meet water quality standards, and characterize how much of each pollutant the water body can assimilate without violating those standards. The DEP considers future growth and development to the extent possible in

establishing a TMDL, and accounts for the pollutant inputs from all sources, including discharges from industrial plants and sewage treatment facilities, runoff from farms, forests and urban areas, and natural sources.

In deriving a TMDL and subsequently setting forth the mechanisms that may be employed to enable the water body to meet standards, the DEP must balance the quantities of pollutants from all sources so that the total amount does not exceed the limits necessary to maintain water quality. Through these assessments, DEP can better determine permit effluent limits, best management practices, pollution prevention strategies, and other resource management activities necessary to ensure that waters are suitable for fishing, drinking, recreation, and aquatic life.

Using a TMDL approach for water bodies does not replace existing water quality control programs or standard treatment technologies. It provides a framework for evaluating all possible water quality control efforts and promotes closer coordination of local, state, and federal efforts to better guarantee that we collectively meet water quality goals.

What is the 303(d) list?

Under section 303(d) of the Clean Water Act, every two years each state must identify water bodies that do not meet water quality standards. These water bodies are "water quality-limited" estuaries, lakes, and streams that fall short of surface water quality standards, and that are not expected to improve within the subsequent two years. Florida's water quality standards are designed to ensure that our waters can be used for their designated purposes, such as swimming, drinking, industrial and agricultural uses, and wildlife habitat. Florida's [303\(d\) list](#) identifies hundreds of "impaired" water segments, with the four most common water quality concerns being coliforms, nutrients, oxygen demanding substances, and turbidity. These water segments are candidates for more detailed assessments of water quality and, where necessary, the development and implementation of TMDLs.

How is the Florida 303(d) list developed?

The 303(d) list is developed based on the Florida Water Quality Assessment [305(b) report]. Section 305(b) of the CWA requires states to report biennially to the EPA on their water quality. The 305(b) report describes the existing programs to protect the quality of Florida's surface waters, ground water, and wetlands. In the 305(b) report, water quality is evaluated using biological data, chemistry data from the federal water quality database (STORET), violations of Florida's water quality standards, mercury fish consumption advisories, qualitative nonpoint source assessments, and other information solicited through public workshops. The information in the report is reviewed and water bodies are placed on the 303(d) list of impaired waters based on specific criteria designed to identify the highest priority water bodies in need of restoration based on the best available data.

What is a Basin Management Action Plan (BMAP)?

It is the "blueprint" for restoring impaired waters by reducing pollutant loadings to meet the allowable loadings established in a Total Maximum Daily Load (TMDL). It represents a comprehensive set of strategies--permit limits on wastewater facilities, urban and agricultural best management practices, conservation programs, financial assistance and revenue generating activities, etc.--designed to implement the pollutant reductions established by the TMDL. These broad-based plans are developed with local stakeholders--they rely on local input and local commitment--and they are adopted by Secretarial Order to be enforceable.

ATTACHMENT FOR BOCC CANAL RESTORATION WORKSHOP

Memorandum from Cynthia Hall, Assistant County Attorney

Re: Funding Alternatives, Canal Restoration Projects

MEMORANDUM
Office of the Monroe County Attorney

TO: Mayor and Commissioners:

Through: Bob Shillinger, County Attorney

FROM: Cynthia L. Hall, Assistant County Attorney

Cc: Assistant County Attorneys Pedro Mercado and Nat Cassel

DATE: September 8, 2015

SUBJECT: Funding Alternatives, Canal Restoration Projects

You requested a memo outlining alternatives for funding the following:

- (1) Ongoing operation and maintenance costs for current pilot projects (after initial 2-year period); and
- (2) Construction costs for future canal restoration projects (rollouts of pilot projects); and
- (3) Ongoing operation and maintenance costs for future canal restoration projects.¹

BRIEF ANSWER

The County could likely use non-ad valorem special assessments to pay for the Project Costs, provided they meet the two legal requirements (special benefit to the property, and fairly and reasonably apportioned). Special assessments in turn can be used as a pledge for issuance of revenue bonds.

The County could also use ad valorem taxes to pay for the projects. It is less likely that the County could create a municipal service taxing unit (MSTU) to delineate a geographic area, if it wishes to collect the taxes in something less than the unincorporated county as a whole. While the County is authorized to create MSTUs under Section 125.01(1)(q), Fla. Stat., canal improvement projects are not explicitly within the list of acceptable uses for a MSTU delineated in the statute and there are no cases holding that similar types of projects can be funded using an MSTU. Ad valorem taxes do not require a referendum.

¹ Collectively, these costs are referred to herein as “Project Costs.”

Assuming no legal challenges, the time period for levying a special assessment is approximately twelve (12) months from the time of the first resolution until the day on which the assessments begin to be collected. The time period for collection of ad valorem taxes is shorter than special assessments: approximately six (6) months.

ANALYSIS

A. Special Assessments (With or Without the Creation of an MSBU) Could Be Used For Canal Project Costs.

1. The Legal Test for Special Assessments.

“[A] valid special assessment must meet two requirements: (1) the property assessed must derive a special benefit from the service provided; and (2) the assessment must be fairly and reasonably apportioned according to the benefits received.” *Sarasota County v. Sarasota Church of Christ*, 667 So. 2d 180, 183 (Fla. 1995) (citing *City of Boca Raton v. State*, 595 So. 2d 25, 30 (Fla. 1992)).

a. Special Benefit

The test to determine whether a special benefit is conferred by the provision of a service or construction of a public improvement was articulated in the case of *Lake County v. Water Oak Mgmt. Corp.*, 695 So. 2d 667 (Fla. 1997):

In evaluating whether a special benefit is conferred to property by the services for which the assessment is imposed, the test is not whether the services confer a “unique” benefit or are different in type or degree from the benefit provided to the community as a whole; rather, the test is whether there is a “logical relationship” between the services provided and the benefit to real property.

Id. at 669 (footnotes and internal citations omitted). In *Lake County*, the Supreme Court found that there was a logical relationship between the services at issue (solid waste disposal and fire protection services) and the properties at issue. In *Lake County*, the court found that there was a logical relationship between the fire protection services and the properties. *Id.* (“[F]ire protection services do, at a minimum, specially benefit real property by providing for lower insurance premiums and enhancing the value of the property. Thus, there is a “logical relationship” between the services provided and the benefit to real property.”).

Several other Florida counties have levied special assessments for canal improvement costs. *See, e.g.* Manatee County Chapter 2-23 (listing five canal dredging municipal service benefit units (MSBUs)) and Manatee County Code section 2-2-51 (stating that the county is authorized to impose special assessments for “construction, reconstruction, repair, renovation, excavation, dredging, grading, stabilization, and upgrading of greenbelts, swales, culverts, sanitary sewers, storm outfalls, canals, primary, secondary, and tertiary drains, water bodies, marshlands, natural areas, and all or part of a comprehensive storm water management system,

including the necessary appurtenances and structures thereto and including, but not limited to dams, weirs, and pumps); and St. Johns County, Florida, Ordinance No. 2013-23 (Treasure Beach Canal MSBU) (attached).

I was unable to find any published decisions specifically involving special assessments for canal improvement projects. However, special assessments have been upheld in other decisions on the grounds that the assessments confer a special benefit on the properties that benefit from stormwater utility facilities;² law enforcement and mosquito control services;³ wastewater facilities and services;⁴ beach erosion facilities;⁵ and “all expenses including purchase price” for the inland waterway then being constructed to run from Jacksonville to Miami.⁶ It is therefore reasonable to assume that a special assessment for canals would be upheld in the event of legal challenge, provided the assessment meets other legal criteria.

b. Assessment Fairly and Reasonably Apportioned

Assessed costs must be apportioned among the benefited parcels in a manner consistent with the logical relationship to the property of the service or improvement assessed. The method of apportionment can vary within the legislative discretion of the governing body. *See Meyer v. City of Oakland Park*, 219 So. 2d 417, 419 (Fla. 1969) (upholding sewer assessment based on square footage of property); *Sarasota County v. Sarasota Church of Christ* (upholding a stormwater assessment that differentiated between residential and commercial properties, and did not assess vacant properties); *State v. Sarasota County*, 693 So. 2d 546 (Fla. 1997) (upholding a stormwater assessment that imposed a higher rate on developed properties with impervious surfaces than those without impervious surfaces, on the grounds that the former contributed more to stormwater runoff).

In *Morris v. City of Cape Coral*, 163 So. 3d 1174 (Fla. 2015), the Florida Supreme Court recently held that a two-tier assessment for fire protection services was fairly and reasonably proportioned. In this assessment program, all properties received the same base assessment (Tier 1, covering 70% of total fire service costs), and developed properties were assessed an additional amount based on the value of structures and other improvements on the property (Tier 2). The Supreme Court upheld the two-tier methodology:

By adopting the approach recommended in the study, the City has attempted to apportion the costs based on both the general availability of fire protection services to everyone (Tier 1) and the additional benefit of improved property owners of protecting structures from damage (Tier 2). We have not previously addressed a bifurcated

² *Sarasota County v. Sarasota Church of Christ*, 667 So. 2d at 186-87.

³ *Quietwater Entm't, Inc. v. Escambia Cnty.*, 890 So. 2d 525, 526 (Fla. Dist. Ct. App. 2005).

⁴ *Citizens Advocating Responsible Envtl. Solutions, Inc. v. City of Marco Island*, 959 So. 2d 203, 207 (Fla. 2007).

⁵ “[F]inancing of restoration and extension of ocean beaches by sands brought in from offshore dredging by general obligation bond was not improper on theory that only property owners alongside ocean shore would be benefited and therefore the erosion problem should be financed by special assessment.” *Hillsboro Island House Condo. Apartments, Inc. v. Town of Hillsboro Beach*, 263 So. 2d 209 (Fla. 1972).

⁶ *State ex rel. Board of Commissioners of Florida Inland Nav. Dist. v. Latham*, 163 So. 890 (Fla. 1935).

approach to fire service assessments. However, this sort of approach closely resembles the approach we approved in *Sarasota Church of Christ*.

It is likely that the County could construct a two tiered assessments program, in which Tier 1 would be an assessment for all properties, and Tier 2 would be an assessment for “wet” lots adjacent to the benefited canals.

If the construction costs for the rollout are included within the Project Costs, it is quite possible that property owners may complain, on the grounds that the owners at the pilot stage did not pay the construction costs. I was unable to find any cases addressing this. Current cases addressing the “apportionment” prong focus on apportionment vis-à-vis other properties within the benefit area, rather than the cost of an assessment in one program or MSBU vis-à-vis the cost of an assessment in another program or MSBU.

2. Defining the Geographic Area / Setting up a Municipal Service Benefit Unit

The County has the authority under Section 125.01(1)(q), Fla. Stat., to create a municipal service benefit unit (MSBU) to receive the assessments.⁷ MSBUs are not *required* for special assessments, because the geographic areas in which the assessments are imposed are delineated in any event by the initial and final assessment resolutions, as required by Section 197.3632, Fla. Stat. However, for the purpose of this discussion, this memo will use the word “MSBU” to mean “the geographic area in which the assessment is levied.”

One of the challenges will be how to define the MSBU, in a way that means that the costs are fairly apportioned among the benefited parcels “in a manner consistent with the logical relationship to the property of the service or improvement assessed.” A few thoughts:

- Because property owners in the pilot projects do not have to pay for construction costs (only future maintenance costs), it would make sense to create separate MSBUs for the existing pilot projects to collect the assessments for those future maintenance costs. A separate MSBU could be created for each pilot project location, unless the future maintenance costs can be grouped and averaged.
- Multiple MSBUs could be created to cover all properties serviced by a particular type of technology at time of rollout – for example, “all properties covered by the muck removal process”. The advantage to having one MSBU per type of technology is that the costs are likely to be similar, if not exactly the same. The disadvantage of this approach is that it is possible that the MSBU could hold properties in very different parts of the Keys, and it would be more difficult to argue that the properties receive the overall “Tier 1” benefit of water quality improvement. If the cost of the technology is different in one part of the Keys than another, it also becomes more difficult to argue that a common assessment represents a “local relationship . . . [with] the service or improvement . . .”

⁷ The term “taxing unit” is used when taxes are being collected, and the term “benefit unit” is used when special assessments are being collected. See *Madison County v. Foxx*, 636 So. 2d 39, 42 n.8 (Fla. 1st DCA 1994) (citing *amici curiae* brief filed by Robert I. Nabors, Esq. of Nabors, Giblin & Nickerson on behalf of FACA).

- Alternatively, one MSBU could be created to collect assessments for all the canal technologies in the aggregate. It might be more difficult to make an argument that each property within the MSBU has a “logical relationship [with] the service or improvement assessed” if different canals have different technologies (and different associated costs).⁸
- The assessment does not have to represent 100% of the Project Costs. The Commissioners can make a policy decision to limit the assessment to a portion of the overall Project Costs, as was done with wastewater.

3. Timetable for Special Assessments

The following sequence of events required for a special assessment is laid out in Section 197.3632, Fla. Stat., the uniform method for collection of non-ad valorem assessments. There is approximately a 12-month time period between when the County adopts its first resolution and when the assessment appears on a tax bill (barring unforeseen delays, including legal challenges).

- Prior to January of the year in which the special assessment will be levied for the first time, the County must adopt a resolution stating its intent to use the uniform method to levy and collect the assessments. The resolution must be approved at a public hearing after published notice. The resolution must be sent to the Property Appraiser and the Tax Collector by January 10. (F.S. 197.3632(3).) The resolution simply states the County’s intent to use the uniform method. Therefore, the Project Costs are not needed for the language of the resolution, however, in the past, the Commissioners have expressed a preference for knowing the figure at this point before proceeding.
- In April – June of the year in which the assessment will be levied, the County must adopt an initial assessment resolution (IAR). In order to prepare the IAR, County staff and consultants will need to know the total Project Costs (whatever will be covered by the assessment) by January or February. Following adoption, the assessment roll is prepared. (F.S. 197.3632(3).)⁹
- July (August at the latest), the County adopts the final assessment resolution, after a public hearing. (F.S. 197.3632(4).)

⁸ St. Johns County has created the Treasure Beach Canal MSBU. Inquiries with the St. Johns County Attorney’s Office regarding that MSBU are pending. Camille Tharpe from GSG also advises that she has worked with a number of counties setting up MSBUs for canal projects, but I have not yet had a conversation with her about the methodology, particularly with respect to (a) different technologies and (b) non-contiguous geographical areas.

⁹ The County currently has two chapters in Monroe County Code laying out the procedure for levying and collecting special assessments: Chapters 20 (Wastewater) and 21 (Solid Waste). If the County were to adopt a canal assessment, we would need either to add a new chapter for the canal assessments, or move the two existing assessment programs into one new chapter and add language about the canal assessment.

- The assessment roll is certified by September 15. The non-ad valorem assessments will appear on the tax bill issued on November 1. (F.S. 197.3632(5), (7).)

Non-ad valorem assessments are collected beginning on November 1. The funds are remitted periodically to the County by the Tax Collector (weekly for the first several months, and then monthly).

Special assessments can be collected in phases. For example, the County could initially adopt the resolution collecting assessments to cover maintenance costs only for the pilot projects only, and could wait until a subsequent tax year to adopt the resolution imposing special assessments for the rollout phase.

B. Ad Valorem Taxes Can Be Also Used For Canal Project Costs.

The Florida Constitution and Section 125.01(1), Fla. Stat., grant to all county governing bodies all powers not inconsistent with general or special law. This includes, but is not limited to, the power to establish and administer programs of navigation and drainage;¹⁰ provide and regulate water and alternative water supplies; and “[p]erform any other acts not inconsistent with law, which acts are in the common interest of the people of the county, and exercise all powers and privileges not specifically prohibited by law.”¹¹

Concomitant with the grant of authority to perform the acts is the need to raise money. Thus, Section 125.01(1)(r) grants to counties the power to levy and collect taxes, both for county purposes and for the providing of municipal services within any municipal service taxing unit, as well as special assessments.¹²

The maximum millage levied for all county purposes may not exceed ten mills in the aggregate for county purposes. Art. VII, s. 9(b), Fla. Const.; AGO 89-89.¹³ Subject to consent by ordinance of a governing body of an affected municipality, an MSTU may include all or part of the boundaries of a municipality.

¹⁰ Section 125.01(1)(j), Fla. Stat.

¹¹ Section 125.01(1)(w), Fla. Stat.

¹² Section 125.01(1)(r), Fla. Stat.

¹³ The constitutional millage limitation in Art. VII, s. 9(b) is as follows:

- 10 mills for the county;
- 10 mills for municipal purposes;
- to the extent authorized by law, a county furnishing municipal services may levy additional taxes within the limit for municipal purposes;
- special districts may levy a millage authorized by law and approved by voters; and
- the 10 mill limitations for counties and municipal purposes may be exceeded, but only for approved by electors for (a) two years for general governmental purposes or (b) payment of bonds.

No referendum is required for the levy of ad valorem taxes. Section 125.01(1)(r), Fla. Stat.¹⁴

C. Creation of an MSTU Is Required For Levy of Taxes In Less Than The Entire Unincorporated Area of the County.

Counties are authorized by Sections 125.01(1)(q) and (r), Fla. Stat., to establish MSTUs or MSBUs in order to collect taxes or assessments for certain purposes on less than a countywide basis, in the unincorporated area of the county.

An MSTU must be created for the collection of taxes on something less than a countywide basis.¹⁵

The list of purposes for which an MSTU (or MSBU) may be created is outlined in Section 125.01(1)(q):

(1) The legislative and governing body of a county shall have the power to carry on county government. To the extent not inconsistent with general or special law, this power includes, but is not restricted to, the power to:

* * *

(q) Establish, and subsequently merge or abolish those created hereunder, municipal service taxing or benefit units for any part or all of the unincorporated area of the county, within which may be provided fire protection; law enforcement; beach erosion control; recreation service and facilities; **water; alternative water supplies, including, but not limited to, reclaimed water and water from aquifer storage and recovery and desalination systems;** streets; sidewalks; street lighting; garbage and trash collection and disposal; waste and sewage collection and disposal; drainage; transportation; indigent health care services; mental health care services; **and other essential facilities and municipal services** from funds derived

¹⁴ Section 125.012(2) also grants to “any county and the board of county commissioners” the power to construct, maintain, repair and operate any project as defined in s. 125.011”, and also the power to “construct and improve . . . all navigable and nonnavigable waters” as well as the authority to “construct and maintain such canals, slips, turning basins, and channels and upon such terms and conditions as may be required by the United States . . .” F.S. 125.012(1) and (2). F.S. 125.011(2)(a) even specifically defines the term “project” to include canals. However, F.S. 125.011(1) specifically defines the term “county” as used in sections 125.011 through 125.019 as a **charter county operating under a home rule charter adopted pursuant to ss. 10, 11, and 24, Art. VIII of the Constitution of 1885, as preserved by Art. VIII, s. 6(e) of the Constitution of 1968 (emphasis added)**. No court has held that the term as used in these sections applies to a non-charter county. While Monroe County’s ability to adopt a charter under Art. VIII, s. 10 of the 1885 Constitution was preserved in Art. VIII, s. 6 of the 1968 Constitution, that process contemplates consolidating any or all local governments within Monroe County with the City of Key West. Accordingly, while this certainly is a theoretical option, it is not likely to be pursued. A simpler option would be to seek a legislative change to the definition of the term *county* in F.S. 125.011(1).

¹⁵ An MSBU is optional but not required for collection of special assessments, because the statutory method for levying and collecting a special assessment using the uniform method outlined in Section 197.3632, Fla. Stat. allows the Board of County Commissioners to define the properties to be covered by the assessments via a resolution adopted after a publicly-noticed hearing, without the need for an MSBU.

from service charges, special assessments, or taxes within such unit only. This paragraph authorizes all counties to levy additional taxes, within the limits fixed for municipal purposes, within such municipal service taxing units under the authority of the second sentence of s. 9(b), Art. VII of the State Constitution.

A new MSTU will probably be required. Chapter 22 of the Monroe County Code, Article II, the codification of Ordinance 5-1977, sets up eight (8) MSTUs for law enforcement, beach erosion control, recreation service and facilities, streets, sidewalks, street lighting, drainage or transportation equipment; four (4) MSTUs for fire and EMS in addition to the above; plus one (1) MSTU to raise money for local road patrol law enforcement.¹⁶ Article II provides rules applicable to the governing bodies of these MSTUs. (Separately, Articles III through VI creates ten (10) additional MSTUs specific to the collection of ad valorem taxes for wastewater and/or reclaimed water projects.)

None of the existing MSTUs appears to match the canal restoration project, either in the stated purpose or in the description of the anticipated geographic boundaries. Therefore, if ad valorem taxes are used to fund the project, and if an MSTU is required, a new MSTU should be created.

The time period for collecting ad valorem taxes is approximately six (6) months if an MSTU is required.

ADDITIONAL OPTIONS

Additional options for funding the canal restoration program include state and federal sources of funding including but not limited to funds generated through Amendment 1¹⁷ and RESTORE Act¹⁸ funds. These options are beyond the scope of this memo.

¹⁶ The provisions regarding MSTUs and MSBUs are within Chapter 22 (“Special Districts”) despite the fact that MSTUs and MSBUs are not special districts. *See* AGO 92-31. Special districts are created pursuant to Section 125.01(5)(a), whereas taxes and special assessments are levied pursuant to Section 125.01(1)(q) and (r).

¹⁷ Art. X, s.28, Fla. Const., the Land Acquisition Trust Fund.

¹⁸ 33 U.S.C.A. s. 1321

ATTACHMENT FOR BOCC CANAL RESTORATION WORKSHOP

**An Existing Monroe County Example of a Privately Funded Canal Restoration -
Breezeswept Beach Estates Municipal Service Culvert District**

R.

**BOARD OF COUNTY COMMISSIONERS
AGENDA ITEM SUMMARY**

Meeting Date: September 4, 2002

Division: County Attorney

AGENDA ITEM WORDING:

Approval of an ordinance creating the Breezeswept Beach Estates Municipal Service Culvert District with authority to levy a one time per lot assessment of approximately \$670 for acquisition of land and installation of a culvert to improve the water quality of the seventeen canals within the District; approval of advertising 4 times a public hearing for a Resolution directing the Clerk to send certified copy of Resolution to Property Appraiser, Tax Collector, and Florida Department of Revenue; approval of placement on the ballot at the General Election in Monroe County to be held on November 5, 2002, the referendum question: Should there be created within the Breezeswept Beach Estates Subdivision the Breezeswept Beach Estates Municipal Service Culvert District with authority to levy a one time per lot assessment of approximately \$670 for the installation of a culvert to improve the water quality of the seventeen canals within the District?

ITEM BACKGROUND:

Homeowners in subdivision have requested, by vote of Homeowners Association, placement of referendum on general election ballot.

PREVIOUS RELEVANT BOCC ACTION:

May 16, 2002, and August 21, 2002 approval to advertise public hearing.

CONTRACT/AGREEMENT CHANGES:

N/A

STAFF RECOMMENDATIONS:

Approval.

TOTAL COST:

BUDGETED: Yes No

COST TO COUNTY:

APPROVED BY: County Attorney OMB/Purchasing Risk Management

DIVISION DIRECTOR APPROVAL:

James T. Hendrick for JTH

JAMES T. HENDRICK

DOCUMENTATION:

Included To Follow Not Required

AGENDA ITEM # C1

ORDINANCE NO. _____ - 2002

AN ORDINANCE OF THE BOARD OF COUNTY COMMISSIONERS OF MONROE COUNTY, FLORIDA, CREATING THE BREEZESWEPT BEACH ESTATES MUNICIPAL SERVICE CULVERT DISTRICT WITH AUTHORITY TO LEVY A ONE TIME PER LOT ASSESSMENT OF APPROXIMATELY \$670 FOR ACQUISITION OF LAND AND INSTALLATION OF A CULVERT TO IMPROVE THE WATER QUALITY OF THE SEVENTEEN CANALS WITHIN THE DISTRICT; PROVIDING THAT THE ASSESSMENTS MAY BE COLLECTED AS NON-AD VALOREM ASSESSMENTS OR AD VALOREM ASSESSMENTS; PROVIDING FOR SEVERABILITY; PROVIDING FOR THE REPEAL OF ALL ORDINANCES INCONSISTENT HERewith; PROVIDING FOR INCORPORATION INTO THE MONROE COUNTY CODE OF ORDINANCES; AND PROVIDING AN EFFECTIVE DATE.

BE IT ORDAINED BY THE BOARD OF COUNTY COMMISSIONERS OF MONROE COUNTY, FLORIDA that:

Section 1. The Breezeswept Beach Estates Municipal Service Culvert District (hereafter District) is created under Sec. 125.01(1)(q) and (r), Fla. Stat. The District consists of the Breezeswept Beach Estates Subdivision, Plat Book 4 at Page 143, less Block 19, Lots 1 - 99. The Monroe County Board of County Commissioners has determined that the real property in the District will be specially benefited by the improvements described in Section 3.

Section 2. The governing body of the District is the Monroe County Board of County Commissioners. The Chairman of the governing body is the Mayor.

Section 3. The District purpose is to improve the water circulation and quality of the canals located in the District through installation of a culvert under West Indies Drive and Block 19, Lot 32 of Breezeswept Beach Estates Subdivision. The governing body has all the authority granted by general law necessary to carry out the District purpose including borrowing funds through the sale of District tax anticipation notes or warrants.

Section 4. The estimated cost of the acquisition of land and the installation of a culvert, including design and administrative cost, required to improve the water circulation in the District canals is approximately \$336,000. That estimate, when broken down on a per lot basis, is approximately \$670 per lot. Therefore, each lot in the District is to be assessed the amount of \$670, without regard to lot ownership unless the owner is exempt under state law. The per lot assessment may be increased by the sum necessary to cover the expense of borrowing the estimated installation costs through tax anticipation notes or warrants if the governing body so elects. The District assessments may be collected as non-ad valorem assessments or as ad valorem assessments by Florida Statute. The method of assessment shall be set by resolution of the Board of County Commissioners. In addition, the District budget must be approved under all general laws applicable to the adoption and preparation of county budgets.

Section 5. The District funds must be received, held and secured by the Clerk of the Circuit Court in the same way as other County funds. The District funds must be maintained in a separate account and may only be used for the purposes authorized by this ordinance. The District funds may only be disbursed on the direction of the governing body under a requisition signed by the Chairperson/Mayor and countersigned by the Clerk.

Section 6. If any section, subsection, sentence, clause or provision of this ordinance is held invalid, the remainder of this ordinance shall not be affected by such invalidity.

Section 7. All ordinances or parts of ordinances in conflict with this ordinance are hereby repealed to the extent of said conflict.

Section 8. The provisions of this ordinance shall be included and incorporated in the Code of Ordinances of the County of Monroe, Florida, as an addition or amendment thereto, and shall be appropriately renumbered to conform to the uniform numbering system of the Code.

Section 9. This ordinance must be filed in the Office of the Secretary of State of the State of Florida, but will not take effect until a referendum approving the ordinance has been passed by a majority of the electors of the District voting in the referendum, and an easement for the proposed culvert has been granted and recorded in the Official Records of Monroe County, Florida.

PASSED AND ADOPTED by the Board of County Commissioners of Monroe County, Florida, at a regular meeting of said Board held on the _____ day of _____, 2002.

Mayor Charles McCoy
Mayor Pro Tem Dixie Spehar
Commissioner Murray Nelson
Commissioner George Neugent
Commissioner Bert Jimenez

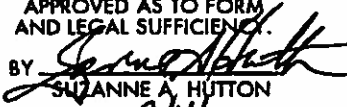
(SEAL)
Attest: DANNY L. KOLHAGE, Clerk

BOARD OF COUNTY COMMISSIONERS
OF MONROE COUNTY, FLORIDA

By _____
Deputy Clerk

By _____
Mayor/Chairperson

jdTDord

APPROVED AS TO FORM
AND LEGAL SUFFICIENCY.
BY 
SUZANNE A. HUTTON
DATE 9/4/02

NOTICE OF REFERENDUM

NOTICE IS HEREBY GIVEN TO WHOM IT MAY CONCERN that the Board of County Commissioners of Monroe County, Florida, have caused to be placed on the ballot at the General Election in Monroe County to be held on November 5, 2002, the following referendum question:

**CREATION OF BREEZESWEPT BEACH ESTATES
MUNICIPAL SERVICE CULVERT DISTRICT
TO IMPROVE DISTRICT CANAL WATER QUALITY**

"SHOULD THERE BE CREATED WITHIN THE BREEZESWEPT BEACH ESTATES SUBDIVISION THE BREEZESWEPT BEACH ESTATES MUNICIPAL SERVICE CULVERT DISTRICT WITH AUTHORITY TO LEVY A ONE TIME PER LOT ASSESSMENT OF APPROXIMATELY \$670 FOR THE INSTALLATION OF A CULVERT TO IMPROVE THE WATER QUALITY OF THE SEVENTEEN CANALS WITHIN THE DISTRICT?"

_____ YES for the creation of the District

_____ NO against the creation of the District

Only those electors residing in the Breezeswept Beach Estates Subdivision less Block 19, Lots 1 - 99, may vote in the referendum.

Avisase a los interesados quienes por la presente vieren, que la Junta de Comisionados del Condado de Monroe, la Florida, ha determinado someter a votacion durante los Comicios Generales, que tendran lugar el 5 de noviembre, 2002, el siguiente asunto en referendum:

**LA CREACION DEL DISTRITO DE SERVICIO MUNICIPAL DE
DESAGUE DE BREEZESWEPT BEACH ESTATES PARA MEJORAR
LA CALIDAD DEL AGUA EN LOS CANALES DEL DISTRITO**

*** DEBERA CREARSE, DENTRO DE LA URBANIZACION BREEZESWEPT BEACH ESTATES, EL DISTRITO DE SERVICIO MUNICIPAL DE DESAGUE DE BREEZESWEPT BEACH ESTATES, CON AUTORIDAD PARA GRAVAR, UNA SOLA Y UNICA VEZ, UN IMPUESTO POR PARCELA DE APROXIMADAMENTE \$670 PARA LA CONSTRUCCION DE DESAGUES DE DRANAJE PARA MEJORAR LA CALIDAD DE AGUA EN LOS CANALES DENTRO DEL REFERIDO DISTRITO?"**

_____ SI para la creacion del distrito

_____ NO en contra de la creacion del distrito

Solamente aquellos votantes residentes en la Urbanizacion Breezeswept Beach Estates, menos parcelas 1 - 99 en Bloque 19, padran votar en el referendum.

DATED at Key West, Florida, this _____ day of _____, 2002.

(SEAL)

**DANNY L. KOLHAGE, Clerk of the Circuit Court
and ex officio Clerk of the Board of County
Commissioners of Monroe County, Florida**

RESOLUTION NO. -2002

A RESOLUTION OF THE BOARD OF COUNTY COMMISSIONERS OF MONROE COUNTY, FLORIDA TO USE THE UNIFORM AD VALOREM METHOD FOR THE COLLECTION OF ASSESSMENTS IN THE BREEZESWEPT BEACH ESTATES SUBDIVISION MUNICIPAL SERVICE CULVERT DISTRICT AND STATING THE REASON THEREFOR

BE IT RESOLVED BY THE BOARD OF COUNTY COMMISSIONERS OF MONROE COUNTY, FLORIDA:

Section 1. The Board of County Commissioners as the governing body of the Breezeswept Beach Estates Subdivision Municipal Service Culvert District (District) declares its intent to use the uniform ad valorem method for the collection of non-ad valorem assessments as authorized by Sec. 197.3632, Fla. Stat., or ad valorem assessments as authorized by Sec. 200.066, Fla. Stat. The assessments will be levied against non-exempt real property within the District. The District is more particularly described as follows: Breezeswept Beach Estates Subdivision as recorded in Plat Book 4 at Page 143.

Section 2. The canal water quality within the District is poor. The levy is needed to finance the installation of a culvert under West Indies Drive and Block 19, Lot 32 of Breezeswept Beach Estates Subdivision, to improve the circulation of water in the canals of the District and hence to improve water quality.

Section 3. The Clerk is directed to send certified copies of this Resolution by September 5, 2002, to:

- a) The Property Appraiser
- b) The Tax Collector
- c) The Florida Department of Revenue

PASSED AND ADOPTED by the Board of County Commissioners of Monroe County, Florida, at a regular meeting of said Board held on the _____ day of _____, 2002.

Mayor Charles McCoy
 Mayor Pro Tem Dixie Spehar
 Commissioner Murray Nelson
 Commissioner George Neugent
 Commissioner Bert Jimenez

(SEAL)
Attest: DANNY L.KOLHAGE, Clerk

BOARD OF COUNTY COMMISSIONERS
OF MONROE COUNTY, FLORIDA

By _____
Deputy Clerk

By _____
Mayor/Chairperson

jdTDRes

APPROVED AS TO FORM
AND LEGAL SUFFICIENCY
 BY Suzanne A. Hutton
 SUZANNE A. HUTTON
 DATE 8/26/02

maintained in a separate account and may only be used for the purposes authorized by this ordinance. The District funds may only be disbursed on the direction of the governing body under a requisition signed by the Chairperson/Mayor and countersigned by the Clerk.

Section 6. If any section, subsection, sentence, clause or provision of this ordinance is held invalid, the remainder of this ordinance shall not be affected by such invalidity.

Section 7. All ordinances or parts of ordinances in conflict with this ordinance are hereby repealed to the extent of said conflict.

Section 8. The provisions of this ordinance shall be included and incorporated in the Code of Ordinances of the County of Monroe, Florida, as an addition or amendment thereto, and shall be appropriately renumbered to conform to the uniform numbering system of the Code.

Section 9. This ordinance must be filed in the Office of the Secretary of State of the State of Florida, but will not take effect until a referendum approving the ordinance has been passed by a majority of the electors of the District voting in the referendum, and an easement for the proposed culvert has been granted and recorded in the Official Records of Monroe County, Florida.

PASSED AND ADOPTED by the Board of County Commissioners of Monroe County, Florida, at a regular meeting of said Board held on the _____ day of _____, 2002.

Mayor Charles McCoy
Mayor Pro Tem Dixie Spehar
Commissioner Murray Nelson
Commissioner George Neugent
Commissioner Bert Jimenez

BOARD OF COUNTY COMMISSIONERS
OF MONROE COUNTY, FLORIDA

(SEAL)
Attest: DANNY L. KOLHAGE, Clerk

By _____
Deputy Clerk

By _____
Mayor/Chairperson

jdTDord

APPROVED AS TO FORM
AND LEGAL SUFFICIENCY
BY Suzanne A. Hutton
SUZANNE A. HUTTON
DATE 8/26/02

NOTICE OF REFERENDUM

NOTICE IS HEREBY GIVEN TO WHOM IT MAY CONCERN that the Board of County Commissioners of Monroe County, Florida, have caused to be placed on the ballot at the General Election in Monroe County to be held on November 5, 2002, the following referendum question:

**CREATION OF BREEZESWEPT BEACH ESTATES
MUNICIPAL SERVICE CULVERT DISTRICT
TO IMPROVE DISTRICT CANAL WATER QUALITY**

"SHOULD THERE BE CREATED WITHIN THE BREEZESWEPT BEACH ESTATES SUBDIVISION THE BREEZESWEPT BEACH ESTATES MUNICIPAL SERVICE CULVERT DISTRICT WITH AUTHORITY TO LEVY A ONE TIME PER LOT ASSESSMENT OF APPROXIMATELY \$670 FOR THE INSTALLATION OF A CULVERT TO IMPROVE THE WATER QUALITY OF THE SEVENTEEN CANALS WITHIN THE DISTRICT?"

_____ YES for the creation of the District

_____ NO against the creation of the District

Only those electors residing in the Breezeswept Beach Estates Subdivision may vote in the referendum.

Avisase a los interesados quienes por la presente vieren, que la Junta de Comisionados del Condado de Monroe, la Florida, ha determinado someter a votacion durante los Comicios Generales, que tendran lugar el 5 de noviembre, 2002, el siguiente asunto en referendum:

**LA CREACION DEL DISTRITO DE SERVICIO MUNICIPAL DE
DESAGUE DE BREEZESWEPT BEACH ESTATES PARA MEJORAR
LA CALIDAD DEL AGUA EN LOS CANALES DEL DISTRITO**

" DEBERA CREARSE, DENTRO DE LA URBANIZACION BREEZESWEPT BEACH ESTATES, EL DISTRITO DE SERVICIO MUNICIPAL DE DESAGUE DE BREEZESWEPT BEACH ESTATES, CON AUTORIDAD PARA GRAVAR, UNA SOLA Y UNICA VEZ, UN IMPUESTO POR PARCELA DE APROXIMADAMENTE \$670 PARA LA CONSTRUCCION DE DESAGUES DE DRAJAJE PARA MEJORAR LA CALIDAD DE AGUA EN LOS CANALES DENTRO DEL REFERIDO DISTRITO?"

_____ SI para la creacion del distrito

_____ NO en contra de la creacion del distrito

Solamente aquellos votantes residentes en la Urbanizacion Breezeswept Beach Estates padran votar en el referendum.

DATED at Key West, Florida, this _____ day of _____, 2002.

(SEAL)

DANNY L. KOLHAGE, Clerk of the Circuit Court
and ex officio Clerk of the Board of County
Commissioners of Monroe County, Florida

Municipal Code Corporation

Municipal Code Corporation
info@mail.municode.com

P.O. Box 2235
Tallahassee, FL 32316-2235

Monroe County, FL Code of Ordinances - 1979(11270) Supplement 78

Recorded: 10/7/2002 1:50:26 PM

We have received the following material through *Hard Copy*.

This is our new acknowledgement format. You will no longer be receiving post cards for ordinances received. If you have any questions please contact us at the phone number or email address listed below.

Thank you for your assistance and cooperation.

Document	Adoption	Description
Ordinance No. 023-2002	9/4/2002	Creating the Breezeswept Beach Estates Municipal Service Culvert District.
Ordinance No. 022-2002	8/21/2002	Providing for the establishment of the School Crossing Guard Trust Fund.
Ordinance No. 021-2002	8/21/2002	Amending Sec. 11-12, to implement the Dori Slosberg Education Safety Act.

Tired of receiving your acknowledgements by mail?
Send us your email address at info@mail.municode.com.
Get our 50th anniversary cookbook at www.municode.com
You can submit your ordinances via email to ords@mail.municode.com.
Should you have questions please contact us.

Are you tired of mailing out codes and supplements?
Tired of printing additional copies of codes?
Let Municipal Code handle the distribution and sales.
Contact the distribution department at: dls@mail.municode.com

Contact Information
Ph 800-262-2633 Fax 650-575-8662 Email info@mail.municode.com

DAVID L. VOLHAGE
CLK. CIR. CT.
MONROE COUNTY, FLA.

2002 OCT 10 AM 10:18

FILED FOR RECORD

ORDINANCE NO. 023 - 2002

AN ORDINANCE OF THE BOARD OF COUNTY COMMISSIONERS OF MONROE COUNTY, FLORIDA, CREATING THE BREEZESWEPT BEACH ESTATES MUNICIPAL SERVICE CULVERT DISTRICT WITH AUTHORITY TO LEVY A ONE TIME PER LOT ASSESSMENT OF APPROXIMATELY \$670 FOR ACQUISITION OF LAND AND INSTALLATION OF A CULVERT TO IMPROVE THE WATER QUALITY OF THE SEVENTEEN CANALS WITHIN THE DISTRICT; PROVIDING THAT THE ASSESSMENTS MAY BE COLLECTED AS NON-AD VALOREM ASSESSMENTS OR AD VALOREM ASSESSMENTS; PROVIDING FOR SEVERABILITY; PROVIDING FOR THE REPEAL OF ALL ORDINANCES INCONSISTENT HERewith; PROVIDING FOR INCORPORATION INTO THE MONROE COUNTY CODE OF ORDINANCES; AND PROVIDING AN EFFECTIVE DATE.

BE IT ORDAINED BY THE BOARD OF COUNTY COMMISSIONERS OF MONROE COUNTY, FLORIDA that:

Section 1. The Breezeswept Beach Estates Municipal Service Culvert District (hereafter District) is created under Sec. 125.01(1)(q) and (r), Fla. Stat. The District consists of the Breezeswept Beach Estates Subdivision, Plat Book 4 at Page 143, less Block 19, Lots 1 - 99. The Monroe County Board of County Commissioners has determined that the real property in the District will be specially benefited by the improvements described in Section 3.

Section 2. The governing body of the District is the Monroe County Board of County Commissioners. The Chairman of the governing body is the Mayor.

Section 3. The District purpose is to improve the water circulation and quality of the canals located in the District through installation of a culvert under West Indies Drive and Block 19, Lot 32 of Breezeswept Beach Estates Subdivision. The governing body has all the authority granted by general law necessary to carry out the District purpose including borrowing funds through the sale of District tax anticipation notes or warrants.

Section 4. The estimated cost of the acquisition of land and the installation of a culvert, including design and administrative cost, required to improve the water circulation in the District canals is approximately \$336,000. That estimate, when broken down on a per lot basis, is approximately \$670 per lot. Therefore, each lot in the District is to be assessed the amount of \$670, without regard to lot ownership unless the owner is exempt under state law. The per lot assessment may be increased by the sum necessary to cover the expense of borrowing the estimated installation costs through tax anticipation notes or warrants if the governing body so elects. The District assessments may be collected as non-ad valorem assessments or as ad valorem assessments by Florida Statute. The method of assessment shall be set by resolution of the Board of County Commissioners. In addition, the District budget must be approved under all general laws applicable to the adoption and preparation of county budgets.

Section 5. The District funds must be received, held and secured by the Clerk of the Circuit Court in the same way as other County funds. The District funds must be maintained in a separate account and may only be used for the purposes authorized by this ordinance. The District funds may only be disbursed on the direction of the governing body under a requisition signed by the Chairperson/Mayor and countersigned by the Clerk.

Section 6. If any section, subsection, sentence, clause or provision of this ordinance is held invalid, the remainder of this ordinance shall not be affected by such invalidity.

Section 7. All ordinances or parts of ordinances in conflict with this ordinance are hereby repealed to the extent of said conflict.

Section 8. The provisions of this ordinance shall be included and incorporated in the Code of Ordinances of the County of Monroe, Florida, as an addition or amendment thereto, and shall be appropriately renumbered to conform to the uniform numbering system of the Code.

Section 9. This ordinance must be filed in the Office of the Secretary of State of the State of Florida, but will not take effect until a referendum approving the ordinance has been passed by a majority of the electors of the District voting in the referendum, and an easement for the proposed culvert has been granted and recorded in the Official Records of Monroe County, Florida.

PASSED AND ADOPTED by the Board of County Commissioners of Monroe County, Florida, at special meeting of said Board held on the 4th day of September, 2002.

Mayor Charles McCoy
Commissioner Tom Dixie Spehar
Commissioner Murray Nelson
Commissioner George Neugent
Commissioner Bert Jimenez

DANNY L. KOLHAGE, Clerk

By Daniel C. DeMantis
Deputy Clerk

yes _____
yes _____
yes _____
yes _____
yes _____

BOARD OF COUNTY COMMISSIONERS
OF MONROE COUNTY, FLORIDA

By [Signature]
Mayor/Chairperson

jdTDord

APPROVED AS TO FORM
AND LEGAL SUFFICIENCY.
BY [Signature]
SUZANNE A. HUTTON
DATE 9/4/02

FILED FOR RECORD
2002 SEP -5 PM 3:31
DANNY L. KOLHAGE
CLK. CIR. CT.
MONROE COUNTY, FLA.

ATTACHMENT FOR BOCC CANAL RESTORATION WORKSHOP

Principles and Practices of Effective Canal Management Program Development

**Strategies for Development of a Canal Management Plan – Principles and Practices
Provided by Elizabeth Treadway, AMEC Foster Wheeler**

Principles for Effective Program Development:

1. Definition of Level and Extent of Service

The concepts of “level” and “extent” of service address the roles and responsibilities for engaged agencies and organization in the delivery of services to manage infrastructure. The Level of Service sets forth the frequency, investment, and resource allocation for each. LOS is often stated in terms of the defined outcomes by establishing metrics such as:

- a. Number of households served.
- b. Frequency of inspections, repairs, cleaning, dredging, litter patrol.
- c. Miles of system cleaned.

Extent of service is defined in terms of the overall components that are assigned to each agency or organization. In the water/wastewater industry this can be defined as the treatment, distribution and collection systems located in public right of way and ending at the connection of laterals. The Level and Extent of Service are important concepts and policies to establish so that all parties understand their appropriate roles and the limits of their liability.

2. Financial Responsibility – Principles for Infrastructure Management

The delivery of publicly funded services in the management of infrastructure is historically based in both legal structure (ordinances, easements, authorizations) and in practice. Where legal structure is not explicit, and does not clearly assign a public responsibility, we often look to historical practice. In financing for infrastructure, if a government agency has consistently delivered a service over time without explicit authorization by laws, regulations, charters or ordinance, the responsibility is assumed to fall to the government agency and it is most difficult to change. Providing resources to solve problems, address service needs, and repair or replace infrastructure is presumed. Likewise, if the agency has not taken action by practice or legal authority, then the decision to take on infrastructure management responsibility financially is equally challenging. When this is the case, it is important to:

- a. Engage the affected public in an open and transparent dialog regarding the services, goals and priorities of the community.
- b. Build a compelling case for addressing the infrastructure needs through public resources, with known purpose and desired outcomes.
- c. Determine the customer being served, either as a subset of the general public or more broadly for the good of all within the community.

- d. Clarify all the roles and responsibilities for each partner (i.e., local, state and federal government agency, private citizen, collaborative partners).
- e. Define the funding methodology that aligns with the services to be delivered, the community goals and assigned responsibilities.

Summary of Services and Principles Found in Other Communities in Florida with Residential Canals

1. Canals are managed as public waters (i.e., waters of the county or the city), with open access, similar to roadways.
2. Dumping of debris and other materials into the canals is prohibited by local ordinance.
3. Services delivered support the overall integrity of the canal infrastructure:
 - a. Dredging to maintain open, flowing channels.
 - b. Debris removal using skimmers, for example, to remove trash.
 - c. Vegetation control and removal.
 - d. Investigation of complaints.
 - e. Bridge repair.
 - f. Tree trimming when excessive overhang occurs.
 - g. Public education and outreach.
 - h. Coordination of volunteers for cleaning/debris removal.
4. Level of expenditure is consistent for established services with additional support from grants or bonds for major rehabilitation.
5. Funding sources are primarily fees for service, charged across the jurisdiction for the basic level of service with additional support in partnerships, state grants, loans, and general fund.

ATTACHMENT FOR BOCC CANAL RESTORATION WORKSHOP

**Example Letter Sent to Homeowners for the Initial Six Canal Restoration
Demonstration Projects**

USED FOR HOMEOWNER APPROVAL DURING INITIAL 6 DEMONSTRATION PROJECTS

Insert Date _____

Insert Homeowner Name and Address

**Subject: DETERMINING HOMEOWNER INTEREST IN PARTICIPATING IN
CANAL RESTORATION DEMONSTRATION PROJECT
PARCEL ID _____, Location _____**

Dear _____:

Monroe County is considering the potential implementation of various water quality improvement technologies within residential canals throughout the Keys. The Board of County Commissioners has approved a few demonstration projects and has secured funding for the installation of the projects. The installation should improve the water in your canal and there will be no charge for the equipment or installation. On some canals property owners may be asked to pay for the maintenance of the equipment installed in the canal.

Your canal has been identified as a potential candidate for implementation of a restoration technology and we are soliciting information from you to assist in the final selection process.

Your participation in the selection process is vital and necessary to determine whether your canal will be selected. Please take a few moments to answer the following questions related to your canal:

1. **Your canal has been identified as being a suitable candidate for installation of a _____ (insert technology).** Please refer to the attached preliminary design information for an overview of the technologies. Are you interested in Monroe County implementing these water quality improvements in your canal and being a part of the demonstration project?

Yes:

No:

Comments:

**DETERMINING HOMEOWNER INTEREST IN PARTICIPATING IN
CANAL RESTORATION DEMONSTRATION PROJECT
AMEC PROJECT NUMBER 6783-13-2561
December 11, 2013**

2. In certain cases, demonstration projects will require the installation of equipment or structures which will have to be maintained after installation. Please provide your comments on whether you believe your community would be willing to maintain the proposed restoration components after installation?

Yes:

No:

Comments:

Authorized Signature:

Date:

Printed Name:

Please complete and sign this form and return to Wendy Blondin, Monroe County's consultant coordinating the homeowner approvals for the canal demonstration projects at the below address within 2 weeks of receipt of this letter. Failure to respond may result in your canal being removed from consideration.

For further information please contact Wendy Blondin at 305-298-9431 between the hours of 9 AM and 5 PM.

Sincerely,

AMEC ENVIRONMENT & INFRASTRUCTURE, INC.
Representing Monroe County

Wendy Blondin, P.G.
Principal Geologist
5845 N.W. 158th Street
Miami Lakes, FL 33014

Enclosure: Conceptual Design Information